

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FERNANDO NUNEZ,
Petitioner,

v.

JOHN E. WETZEL, et al.,
Respondents

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CASE No. 14-cv-2192

PETITIONER’S STATUS REPORT ON CLAIMS FOUR TO SEVEN

Fernando Nunez, by his counsel undersigned, respectfully submits this status report in accordance with the Court’s Order of January 17, 2023, regarding the status of exhausting Claims Four through Seven of his pro se habeas petition.

1. Unfortunately, undersigned counsel must report that there has been no change since the last status report.

2. In Claim Four of his pro se habeas petition, Mr. Nunez claimed that his sentence of life without parole is unconstitutional under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Based on her reading of the docket in *Commonwealth v. Nunez*, CP-51-CR-402401-2004, and communications with attorneys from the Defender Association of Philadelphia, undersigned counsel understands that the state court judge stated her intention to grant relief on the *Miller* claim and order a new sentencing hearing. However, the sentence has not yet been vacated and a sentencing hearing has not yet been scheduled. Thus, this claim is still pending at the level of the Court of Common Pleas in Philadelphia County.

3. The restricted version of the state court docket, available to Mr. Nunez's state court counsel of record, indicates that a status hearing was held on January 24, 2023. However, no subsequent hearing has been scheduled and undersigned counsel has not been able to ascertain why no subsequent hearing has been scheduled.

4. Undersigned counsel has communicated with an attorney from the Defender Association of Philadelphia who has informed undersigned counsel that they can only represent Mr. Nunez on his *Miller* claim and not on any guilt-phase claims. Mr. Nunez wishes to pursue his guilt phase claims. It has not yet been determined if Mr. Nunez is proceeding *pro se* in state court on his PCRA petition or if the Defender Association of Philadelphia will represent Mr. Nunez on his *Miller* claim and re-sentencing.

5. Claims Five through Seven of Mr. Nunez's *pro se* habeas petition involved guilt phase claims. The state PCRA court dismissed all guilt-phase claims as untimely filed, while simultaneously ruling that Mr. Nunez's *Miller* claim was not dismissed and would be further addressed. Mr. Nunez appealed the PCRA court's order to the Superior Court which quashed the appeal because the *Miller* claim was still pending. *Commonwealth v. Nunez*, 272 A.3d 465 (Table) (Pa. Super. Jan. 10, 2022) (No. 1808 EDA 2020) (unpublished disposition). Thus, Mr. Nunez is unable to present his guilt-phase claims to the Superior Court, thereby exhausting those claims, until after his *Miller* claim, including a new sentencing, is fully resolved in the Court of Common Pleas.

6. Undersigned federal habeas counsel for Mr. Nunez will continue to communicate with attorneys at the Defender Association of Philadelphia to monitor the status of Mr. Nunez's *Miller* claim and will file another status report in 30 days.

Respectfully submitted,

DATE: May 1, 2023

/s/ Susan M. Lin
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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, the foregoing Petitioner's Status Report on Claims 4-7 was filed via the Court's CM/ECF system, is available for viewing and downloading, and, as such, was served upon the below counsel:

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